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Supreme Court, U.S.
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No. 97-149

In the Supreme Court of the United States

OCTOBER TERM, 1997

WALID KHALIFE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conspiracy to defraud the United States by hiding taxable income through acts of structuring financial transactions to avoid bank reports to the Internal Revenue Service (IRS) may be charged as a conspiracy "to defraud the United States" under 18 U.S.C. 371 absent proof that petitioners knew their conduct to be illegal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 106 F.3d 1300. The opinion of the district court (Pet. App. 15-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1997. A petition for rehearing was denied on April 24, 1997. Pet. App. 42. The petition for a writ of certiorari was filed on July 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioners Khalife and Abdenour agreed to plead guilty to one count of conspiracy to defraud the United States, in violation

of 18 U.S.C. 371, but reserved their right to challenge the legal sufficiency of that count. Before accepting the guilty pleas, the United States District Court for the Eastern District of Michigan dismissed the conspiracy count. The court of appeals reversed. Pet. App. 1-14.

1. Count 2 of a multi-count indictment charged that, over a nearly four-year period ending in 1991, petitioners and others had conspired to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371.[1] The indictment alleged that petitioners had conspired to interfere with and obstruct the lawful government functions of the IRS by structuring their cash deposits into the accounts of petitioner Goldcorp, Inc., in amounts less than $10,000 to avoid bank reports to the IRS. The overt acts of the charged conspiracy consisted of hundreds of cash deposits into various Goldcorp, Inc., accounts. On each of the several days listed in the indictment, the conspirators made a total deposit of more than $10,000, broken down into lesser deposits, none exceeding $10,000. In total, the conspirators deposited $12,044,249.00 in cash during the course of the conspiracy. Of that amount, $9,233,549.00 involved multiple daily deposits totaling in excess of $10,000 per day that were structured in amounts of less than

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[1] The general conspiracy statute, 18 U.S.C. 371, provides in pertinent part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

$10,000 to avoid the bank's reporting requirement. Not once did the conspirators make an individual deposit of more than $10,000. Gov't C.A. Br. 2-5.

The indictment did not charge petitioners with a substantive offense under 31 U.S.C. 5322 (1988) and 5324(3) (1988), the anti-structuring provisions in effect at the time of petitioners' alleged conduct. Under this Court's decision in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), a criminal prosecution under those provisions would have required proof that petitioners knew their conduct to be illegal.[2] The government conceded that it could not prove that petitioners knew that it was illegal to structure transactions to evade the banks' reporting requirements. See Pet. App. 4, 18-19.

Petitioners moved to dismiss Count 2 of the indictment. Relying on *United States* v. *Curran*, 20 F.3d

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[2] At the time of the conduct at issue in this case, 31 U.S.C. 5324 (1988) prohibited so-called "structuring" activities—*i.e.*, conduct by which an individual "break[s] up a single transaction above the reporting threshold into two or more separate transactions [] for the purpose of evading a financial institution's reporting requirement." *Ratzlaf*, 510 U.S. at 136. A person "willfully violating" the structuring prohibition was subject to criminal penalties under 31 U.S.C. 5322 (1988). This Court held in *Ratzlaf* that a criminal conviction under Section 5322 required proof that the defendant knew his conduct to be unlawful. See 510 U.S. at 140-149.

After this Court's decision, Congress amended Section 5324 byadding a new 31 U.S.C. 5324(c), which establishes criminal penalties for any person who "violates" Section 5324, and which does not require proof of "willfulness." See Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253. Under Section 5324(c), knowledge of illegality is not an element of the structuring offense.

560 (3d Cir. 1994), petitioners argued that they could not be convicted of conspiracy to defraud the United States, based on their participation in structuring activities, without proof of the mental state necessary for the structuring offense itself. Pet. App. 18-19. Petitioners Khalife and Abdenour entered into a plea agreement with the government providing that, if the district court dismissed the conspiracy count and that dismissal were upheld on appeal, the government would dismiss all charges against those two petitioners. *Id.* at 2-3 & n.1. If the district court dismissed the count but it was reinstated on appeal, the plea agreement provided that petitioners Khalife and Abdenour would plead guilty to that count in exchange for dismissal of all other counts. *Ibid.* Petitioner Goldcorp and the government reached a settlement agreement contingent upon the guilty pleas of the other defendants. *Ibid.*

2. The district court granted petitioners' motion to dismiss Count 2 of the indictment. Relying on *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989), the court stated that petitioners could not properly be charged under the "defraud clause" of Section 371 (*i.e.*, conspiracy "to defraud the United States") if the underlying criminal conduct also constituted a violation of a "specific" criminal statute. Pet. App. 30-31. Because "the conduct which the government would rely on to prove [petitioners'] conspiracy to defraud" was, in the district court's view, covered by 18 U.S.C. 1001 (which prohibits the making of false statements to federal officials), the court held that petitioners could not be prosecuted under the defraud clause. Pet. App. 34. The court also stated that "a specific offense, namely 31 U.S.C. § 5324, was enacted to prohibit [petitioners'] conduct,"

and asserted that "[b]y charging [petitioners] under the broad 'defraud' clause of § 371, * * * the government, in effect, 'insulated' itself from having to prove an element of a crime that by its own concession, it cannot prove." *Id.* at 36. It observed as well that petitioners could not have been prosecuted for conspiracy "to commit any offense against the United States" (the "offense clause" of Section 371), because a prosecution under the "offense clause" requires proof that the defendant acted with the mental state necessary to commit the substantive offense itself. See *id.* at 35 (citing *United States* v. *Feola*, 420 U.S. 671, 686 (1975)).

3. The court of appeals reversed. Pet. App. 1-14. Relying on *United States* v. *Jackson*, 33 F.3d 866, 871-872 (7th Cir. 1994), cert. denied, 514 U.S. 1005 (1995), the court held that a conviction under the defraud clause of 18 U.S.C. 371 does not require proof that the defendant's conduct violated a substantive criminal statute. Pet. App. 7-9. Rather, the elements of a conspiracy to defraud the United States under Section 371 are "(1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) the intent to commit the substantive offense, i.e., to defraud the United States." Pet. App. 7 (quoting *Jackson*, 33 F.3d at 872). The court concluded on that basis that "*Ratzlaf* intent does not apply to a § 371 conspiracy to defraud." *Id.* at 9.

ARGUMENT

The court of appeals held in this case that petitioners could be guilty of conspiracy to defraud the United States, based on their involvement in the "structuring" of financial transactions, even if they

did not act with the mental state necessary to sustain a conviction for the structuring offense itself. That decision is correct and is fully consistent with this Court's precedents. Although petitioners contend that the court of appeals' decision conflicts with the Third Circuit's resolution of the same issue, we do not believe that a square conflict exists. In any event, the practical significance of the question presented is limited to prosecutions for conduct that predated amendments to the anti-structuring laws enacted in 1994. Further review is not warranted.

1. Under Section 371, a defendant may be prosecuted either for (1) conspiracy to commit a specific substantive offense (the offense clause), or (2) conspiracy to defraud the United States (the defraud clause). The court of appeals in this case correctly recognized that those two different forms of conspiracy require different mental states. "[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States* v. *Feola*, 420 U.S. 671, 686 (1975). The defraud clause, by contrast, "reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Dennis* v. *United States*, 384 U.S. 855, 861 (1966). There is no requirement that the goal of a conspiracy to defraud the United States be a specific violation of a substantive statute. See *United States* v. *Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993) (under Section 371, "[n]either the conspiracy's goal nor the means used to achieve it need to be independently illegal"); *United States* v. *Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988) ("[S]ection 371's ban on conspiracies to defraud need

not involve the violation of a separate statute"), cert. denied, 488 U.S. 1011 (1989); see also *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910) (predecessor statute) ("The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924) (predecessor statute) ("To conspire to defraud the United States * * * also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.").[3]

If Congress had enacted two separate conspiracy provisions and placed them in different sections of the United States Code, there would be nothing surprising in the application of different mental state

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[3] Petitioners acknowledge that "a conspiracy to defraud need not necessarily contemplate a course of action or a result that violates a federal criminal statute—otherwise, the 'offense' and 'defraud' clauses of § 371 would be redundant." Pet. 21. Indeed, even under petitioners' theory, there would be no apparent barrier to a prosecution under the defraud clause of Section 371 if no federal anti-structuring statute existed. Petitioners' theory ultimately reduces to the implicit proposition that the anti-structuring laws have impliedly repealed the defraud clause as applied to conduct that involves the structuring of financial transactions. This Court has recognized, however, that to establish an implied repeal, "it is not enough to show that the two statutes produce differing results when applied to the same factual situation. Rather, the legislative intent to repeal must be manifest in the positive repugnancy between the provisions." *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (citation and internal quotation marks omitted). Petitioners have identified nothing in the text or history of the anti-structuring laws that establishes a "positive repugnancy" between those laws and the defraud clause of Section 371.

requirements for the two offenses. The analysis is not altered by the fact that Congress chose instead to proscribe two independent ways of violating Section 371. If petitioners had been charged with conspiracy to violate the anti-structuring statute, the government would have been required to prove that they acted with the mental state necessary, under *Ratzlaf*, to establish that offense. But since petitioners were charged with conspiracy to defraud the United States, the mental state required is simply the intent "of impairing, obstructing or defeating the lawful function of any department of Government." *Dennis*, 384 U.S. at 861.

2. Contrary to petitioners' contention (Pet. 15-19), the court of appeals' holding in this case is consistent with this Court's decision in *Bridges* v. *United States*, 346 U.S. 209 (1953). The defendants in *Bridges* were charged with, inter alia, conspiracy to defraud the United States. *Id.* at 212. The gravamen of the indictment was that the defendants had agreed that one of them should fraudulently petition for and obtain naturalization by making false statements to the naturalization court. *Ibid.* Because the indictment was brought after the expiration of the three-year general statute of limitations, the prosecution could go forward only if the running of the general statute of limitations had been suspended by the Wartime Suspension of Limitations Act. *Id.* at 215.

The Court held that the prosecution was barred by the statute of limitations, explaining that "the Wartime Suspension of Limitations Act applies * * * only where the fraud is of a pecuniary nature or at least of a nature concerning property." 346 U.S. at 215. The Court did not suggest that its construction of the Wartime Suspension of Limitations Act would

define the coverage of the defraud clause of Section 371. To the contrary, the Court distinguished its prior decisions in *Haas* and *Hammerschmidt* on the ground that "[t]he statements there made refer to conspiracies to defraud the United States 'in any manner or for any purpose' as used in the second clause of the general conspiracy section. They do not control the interpretation of the provisions in the Wartime Suspension of Limitations Act." *Id.* at 221 n.19 (citations omitted). Thus, as the Court subsequently recognized in *Dennis*, the decision in *Bridges* "did not turn upon construction of § 371," but rested instead upon the Court's interpretation of the Wartime Suspension of Limitations Act. 384 U.S. at 863.

The Court in *Bridges* also stated, as "[a] further ground for [its] conclusion," that the Wartime Suspension of Limitations Act and similar statutes had previously been construed as "limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged.*" 346 U.S. at 221. In concluding that that standard had not been met, the Court stated that the indictment's reference to the defraud clause of Section 371 "merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement." *Id.* at 224. Whatever the precise import of that statement, this Court has made clear that prosecution under the defraud clause is not rendered improper simply because the alleged fraudulent conduct may be covered by another criminal statute. See *Dennis*, 384 U.S. at 863-864 ("The fact that the events include the filing of false statements [punishable under 18 U.S.C. 1001] does not, in and of itself, make the conspiracy-to-defraud clause of § 371

unavailable to the prosecution."); see also pp. 6-7, *supra*.

3. Petitioners argue (Pet. 8-15) that the court of appeals' decision in this case conflicts with the decisions of the Third Circuit in *United States* v. *Curran*, 20 F.3d 560 (1994), and *United States* v. *Alston*, 77 F.3d 713 (1996). In *Curran*, the defendants were charged with "conspir[acy] to defraud the United States in violation of 18 U.S.C. § 371 by impeding the Federal Election Commission's performance through obstruction and interference with the Commission's reporting requirements, and by causing fictitious statements to be made on reports required to be sent to the Commission." 20 F.3d at 571. The court stated that "the instructions on intent as to the conspiracy count must track those applicable to the substantive counts." *Ibid.* In support of that conclusion, the Third Circuit cited *United States* v. *Feola* and a number of other cases involving conspiracy prosecutions brought under the *offense* clause of Section 371. See 20 F.3d at 571. In *Alston*, the court relied on *Curran* in holding that in a prosecution under the defraud clause of Section 371, based on the defendants' participation in structuring activities that predated the 1994 amendments to the anti-structuring laws, the government was required to prove that the defendant knew his conduct to be illegal. 77 F.3d at 719-721.

We do not believe that a square circuit conflict exists. The Third Circuit in *Alston* narrowly cabined its holding to the proposition that "[i]f the 'offense' clause of § 371 specifically covers an act or offense and the indictment charges only that act or offense as having been committed, and the proofs at trial reveal no more than such acts of offense, a defendant not guilty under the 'offense' clause cannot alternatively

be convicted under the broad 'defraud' clause of § 371." 77 F.3d at 721. It asserted that "the cases that have upheld convictions for conspiracy to defraud under § 371 have all involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for pre-1994 structuring." *Ibid.* In the instant case, the court of appeals observed that the alleged conspiracy "implicated several crimes including mail fraud, money laundering, making and subscribing a false tax return, conspiracy to use a false writing, concealing and covering up material facts, and firearms violations." Pet. App. 10 n.4. It is therefore far from clear that petitioners could obtain relief even under the standard adopted by the Third Circuit.

In any event, the question whether a defraud clause prosecution based on structuring activities requires proof of knowledge of illegality is of rapidly diminishing importance. As amended in 1994, the criminal anti-structuring statute contains a prohibition that contains no element of willfulness, which was the element that this Court in *Ratzlaf* construed to require knowledge of illegality. See note 2, *supra*. Thus, the practical effect of the Third Circuit's holding in *Alston* is limited to prosecutions alleging pre-amendment conspiracies. See *Alston*, 77 F.3d at 717 n.12 (observing that "[i]n light of the 1994 amendment to § 5324, * * * the instant situation is unlikely to occur again.").

4. Petitioners contend that the significance of the court of appeals' decision "go[es] far beyond the admittedly limited group of pre-*Ratzlaf* 'structuring' cases that may be still be eligible for prosecution" because the decision "invites the criminalizing of a whole range of conduct which has not been legisla-

tively defined, and is neither unlawful nor otherwise wrongful." Pet. 23-24. That claim is without merit. The requirement that the defendant be shown to have entered into an agreement "for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," *Dennis*, 384 U.S. at 861, provides assurance that defendants will not be subjected to criminal liability under the defraud clause of Section 371 for engaging in apparently innocent conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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